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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF CAPE GIRARDEAU, MISSOURI,
Petitioner,

vs.

WESTBOROUGH MALL, INC., GEORGE STAPLES, JR.,
and WESTBOROUGH MALL ASSOCIATES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

Has a landowner been deprived of his property without due process of law under 42 U.S.C. §1983 and *Parratt v. Taylor*, 451 U.S. 527 (1981) when a City Manager erroneously dealt with the parcel based upon his negligent mistake as to its correct zoning status, where formal and informal avenues of complaint to the City and state court declaratory judgment and money damage procedures were available to the landowner to correct the mistake, and where the landowner knew a mistake had been made and deliberately chose to delay revealing the error to the City for 11 months?

PARTIES TO THE PROCEEDING

Petitioner City of Cape Girardeau (herein the "City") is one of the Defendants in a suit filed by Respondents-Plaintiffs Westborough Mall, Inc., George Staples, Jr., and Westborough Mall Associates (a limited partnership) now pending in the United States District Court for the Eastern District of Missouri (Southeastern Division) and on appeal to the United States Court of Appeals for the Eighth Circuit (84-1301). Other Defendants (herein jointly called "May-Drury") are Charles L. Drury, Drury Industries, Inc., May Department Stores, Co., West Park Associates, May Centers of Cape, Inc., and May Centers, Inc., who are filing their separate Petition for Writ of Certiorari.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reproduced in Appendix A and is reported at 794 F.2d 330.

JURISDICTION

The Eighth Circuit Court of Appeals opinion was entered on June 17, 1986. Its order denying rehearing (Appendix B) is dated October 23, 1986, and this Petition is filed within 90 days thereafter. Jurisdiction of this Court is founded upon 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves the proper application of 42 U.S.C. §1983, which reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

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STATEMENT OF THE CASE

In 1973, Plaintiffs (Respondents here) obtained C-4 zoning in the City of Cape Girardeau, Missouri (Petitioner here) for their Westborough Mall tract, a special zoning category which was designed for large integrated shopping center developments and was being used for the first time in the City's history. Only minimal development progress was made in the next five years. In 1979, the individuals and corporations herein referred to jointly as "May-Drury" applied to the City for interim rezoning for their own nearby West Park Mall development, and when the City granted that interim rezoning, Plaintiffs immediately filed this suit in state court against the individual members of the City Council seeking to declare the West Park Mall zoning void.

In the course of response to questions from the press about the suit against the City Council members, the City Manager stated that he had observed that the City's general zoning rules provided that C-4 zoning automatically reverts to its previous status if the development is not completed within three years. He then expressed his opinion that Plaintiffs' C-4 zoning granted by ordinance in 1973 had since reverted to its previous classification because of the passage of five years without further development. He later changed the City zoning map to show the parcel with its previous classification and reported his actions to the City Council.

The City Manager had made a mistake, however, because he failed to observe that the 1973 ordinance granting C-4 zoning to Plaintiffs' Westborough Mall tract contained a special provision that exempted the tract from the automatic reverter provision. Plaintiffs admitted at trial that they quickly learned of the City Manager's mistake but did not make any effort to contact him or the City Counsel about the error and seek correction of the erroneous opinion.

The press quoted Plaintiff Staples (the managing agent for all the Plaintiffs) as stating that "Our attorney tells us that there is no conversion of land and we are zoned permanently into C-4 status .... We are not concerned. We have our zoning documented, you can rest assured." Staples also wrote one of his partners that he had been assured by their attorney that "... we presently have C-4 zoning and we should not concern ourselves with the same and should proceed with our development as if the matter had not come up." Staples did not tell the press or his partners that the reverter exemption was his reason for lack of concern over the matter.

Later in 1979, May-Drury made its permanent rezoning application and was granted C-4 zoning for its own West Park Mall tract. Plaintiffs then filed their First Amended Petition in state court which added Petitioner City as a Defendant, claimed that May-Drury's C-4 zoning was invalid, sought a permanent

injunction against further rezonings, and sought $2.5 million damages because the City Manager had stated that the Plaintiffs' property no longer carried C-4 zoning.

Thereafter, Plaintiffs' financial advisor inquired of the City about the Westborough Mall zoning status, and the City Manager responded that it was the City staff's opinion that the site no longer carried a C-4 zoning classification and that the financial advisor might wish his own legal staff to satisfy him on the validity of that opinion. The financial advisor testified at trial that the status of the zoning did not actually affect him in any material way, because he had long been unable to proceed with Plaintiffs' loan application due to their failure to send him any proof of anchor tenant leases, proposed tenant lease forms, development financial information, and a security deposit. At trial, Plaintiffs offered no proof whatsoever that any prospective anchor tenant, small tenant, contractor, creditor, lending agency, investor, the public, or any other person having anything to do with Westborough Mall was affected in any way by the City Manager's mistaken opinion or saw the changed map.

Eleven months after the original suit was filed, a Second Amended Petition was filed in state court adding Staples individually and Westborough Mall Associates as Plaintiffs. Also added as Defendants were the City Manager personally and the May-Drury Defendants. In that Second Amended Petition, Plaintiffs specifically pleaded that their C-4 zoning stood intact due to the reverter exemption and asked for a judicial determination of their Westborough Mall C-4 zoning status, relief under 42 U.S.C. §1983 and $20 million damages, a declaration that the West Park Mall zonings were invalid, a prohibition against further West Park development, and $5 million punitive damages.

At trial, the former Mayor and a former Councilman both testified that the City Council had no reason to doubt the City

Manager's reverter opinion and that they did not learn about the 1973 reverter exemption until after the exemption had been specifically pleaded in Plaintiffs' Second Amended Petition.

Defendants removed the case to Federal Court based upon the §1983 claim. Plaintiffs then filed a further Amended Complaint in seven counts: two under 42 U.S.C. §1983, four under antitrust and conspiracy theories, and one seeking declaration that the West Park rezonings were invalid. Dropped from this Amended Complaint was any request for declaratory judgment on Plaintiffs' own zoning.

After much discovery, Defendants moved for Summary Judgment, which was granted by the federal District Court. Plaintiffs appealed and the Eighth Circuit Court of Appeals held in *Westborough Mall, Inc. v. City of Cape Girardeau,* 693 F.2d 733 (1982), that Plaintiffs had claimed sufficient facts to entitle them to a trial on the first six counts. However, the Eighth Circuit sustained the Summary Judgment in favor of Defendants on the count seeking declaratory judgment that the West Park Mall zonings were invalid (on the grounds that Plaintiffs had no standing to challenge them) and the Court further dismissed all counts against the individual City Councilmen and the City Manager.

Trial on the six remaining counts commenced in October 1983. After a ten day trial, Plaintiffs voluntarily dismissed three counts. The case was submitted to the jury on Count I against the City under §1983, on Count II against all Defendants under conspiracy to violate §1983, and on Count III against all Defendants under the Sherman Antitrust Section 1 claim of conspiracy to restrain trade. The jury deliberated for only two hours and returned verdicts in favor of all Defendants on all three counts.

Plaintiffs appealed, but abandoned their Count III claim for Sherman Antitrust violations and left alive only Counts I and II under §1983.

On June 17, 1986, an Eighth Circuit Court of Appeals panel reversed (794 F.2d 330) (See Appendix A) and ordered a new trial based upon instructional grounds.

Petitioner City of Cape Girardeau has filed this Petition for Writ of Certiorari to review the Eighth Circuit reversal and challenging federal jurisdiction in the first instance under §1983.

This case was originally filed in the Circuit Court of Cape Girardeau County, Missouri, and was removed to Federal Court under 28 U.S.C. §1441 because of original federal jurisdiction under 28 U.S.C. §1331(a).

ARGUMENT

The Eighth Circuit opinion is contrary to this Court's rulings in *Parratt v. Taylor,* 451 US 527, 68 L. Ed.2d 420, 101 S.Ct. 1908 (1981), and many other decisions of this Court and the Circuits. The opinion treats the case as though the facts involve a defective procedural policy of the City, when the facts actually involve only a negligent mistake by a City official in applying City policy. The Eighth Circuit erred in three respects:

I

The Eighth Circuit opinion permits a random and unauthorized negligent mistake of the City Manager to be the subject of a civil rights action under 42 U.S.C. §1983.

Here the City passed an ordinance in 1973 granting C-4 zoning to Plaintiffs for their proposed mall and exempted the tract from the zoning rule that C-4 zoning automatically reverts to its prior classification if the development is not built within three years. Five years later the City Manager checked the C-4 zoning rules and concluded that Plaintiffs' zoning had automatically reverted because the development had not progressed beyond preliminary stages. When asked by the press, he gave his opinion that Plaintiffs' zoning had reverted. He changed the master zoning map to reflect the tract's former classification. He reported his opinion to the City Council and told them what he had done. The City Council accepted the City Manager's report and had no inkling that he had made a mistake in not seeing the reverter exemption granted more than five years earlier. Plaintiffs claim they were damaged by the error, although they offered no evidence on that point except their financial advisor, who admitted he was not materially affected because Plaintiffs never accomplished any of their financing requirements.

At best, Plaintiffs suffered a negligent defamation of their zoning status. By the 1973 ordinance, the City had established the policy that Plaintiffs' tract was C-4 and free from future

automatic reversion, and the City Manager could not make it revert, no matter what he did.

There was no showing that the City Manager's actions were malicious or intentional or reckless, or that any City Manager had made the same mistake before or since, or that the City had a policy of ignoring zoning exemptions, or that any City Council member knew that the City Manager had made a mistake. There was nothing wrong with the City's policy, but only in the City Manager's mistake in carrying out the policy. At most, the City Manager simply defamed Plaintiffs' zoning, which was a random act unauthorized by the City.

This Court has long held that §1983 does not apply to negligence cases. In *Paul v. Davis,* 424 US 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976), the plaintiff sued under §1983 when he was erroneously listed on a shoplifter warning flyer. The District Court dismissed the claim and this Court sustained that dismissal, stating that the facts were a "classical claim for defamation actionable in the courts of virtually every State". This Court held that "It is hard to perceive any logical stopping place..." if the §1983 claim was allowed and that "...petitioner's defamatory publications, however serious they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause".

In *Baker v. McCollan,* 443 US 137, 61 L. Ed.2d 433, 99 S.Ct. 2689 (1979), where mistaken identity upon an arrest produced a §1983 claim on which the District Court granted a directed verdict for the defendant, the dismissal was upheld by this Court, stating "...nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim."

The now-famous *Parratt v. Taylor,* 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) was decided by this Court in 1981, holding that the prison officials' negligence in losing the plaintiff's hobby kit was a deprivation of his property under

§1983, but that the deprivation was not without due process because post-deprivation state tort procedures were available and pre-deprivation procedures were impractical. Various cases cited by the Court described the difference between established state procedures lacking in due process and a claim arising out of misconduct of an officer. Recently this Court partially revised *Parratt* in *Daniels v. Williams,* 474 US ___, 88 L.Ed.2d 662, 106 S. Ct. 662 (January 1986) (where an inmate slipped on a pillow negligently left on the prison steps) and in *Davidson v. Cannon,* 474 US ____, 88 L.Ed.2d 677, 106 S. Ct. 688 (January 1986) (where the prison officials failed to protect an inmate from assault by another prisoner), holding that the mere lack of care or negligence does not constitute a "deprivation" of property under the context of §1983.

In *City of Oklahoma City v. Tuttle,* ____ US ____, 85 L. Ed.2d 791, 105 S. Ct. ____ (June 1985), a policeman shot the plaintiff's husband and the Tenth Circuit sustained a jury verdict against the City on the claim of inadequate police training. This Court reversed and held:

> "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell,* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policy maker." (Page 804)

In *Hudson v. Palmer,* 468 US ____, 82 L.Ed.2d 393, 104 S.Ct. 3194 (July 1984), an inmate sued under §1983 on a claim that an officer conducted an unwarranted shakedown search of his cell and filed a false charge against him. This Court held that *Parratt* covers intentional violations as well as negligent acts and that adequate post-deprivation remedies were available and thus sustained the District Court grant of summary judgment to the defendant.

In *Thompson v. Steele,* 709 F.2d 381 (CA5 1983), cert. den. 104 S.Ct. 248, the prison warden "simply overlooked" a

mailgram advising the plaintiff inmate of his father's death. The Fifth Circuit affirmed the District Court dismissal of the §1983 case, stating that under *Parratt* the deprivation of the plaintiff's property occasioned by the state official's negligence was not without due process of law.

In *Wadhams v. Procunier,* 772 F.2d 75 (CA4 1985), the plaintiff was held in jail seven days too long due to the failure of one jailor to report the time the plaintiff had spent there. The Fourth Circuit upheld the District Court dismissal of the §1983 claim, stating:

> "This is not so much a case of a lack of procedure; it is simply a case in which a mistake was made." (page 77)
>
> "...[T]he Constitution of the United States does not protect one against such wrongs when the infliction of the wrong is the result of a mistake or inadvertance and not by virture of a state's laws or practices, even though the actors be state officials acting pursuant to their official duties." (page 77)
>
> "The mistake was clearly a random and unauthorized act. The committing Judge intended Wadhams to receive all jail time credits to which he was entitled, and there is no suggestion that any state official intended to deprive him of credit to which he was known to be due." (page 78)

In *Cohen v. City of Philadelphia,* 736 F.2d 81 (CA3 1984), a policeman was dismissed for suspected participation in a crime and sued under §1983 after his acquittal. The Third Circuit affirmed the District Court dismissal, stating "...substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary."

In *Albery v. Reddig,* 718 F.2d 245 (CA7 1983), the City gave the plaintiffs a permit to build a garage and then ordered them to stop construction when plans they later submitted showed it

being built in excess of height limitations, but the plaintiffs discovered there was a different way to measure that height so as to make the plans acceptable under the rules. The plaintiffs sued under §1983 and the District Court dismissed. The Seventh Circuit sustained the dismissal stating that, "It may have been negligent or improvident of Reddig [the zoning official] to issue the permit without receiving and studying the plans, but it is not the stuff of a civil rights violation."

II

The Eighth Circuit opinion permits a claim of denial of procedural due process to be brought under 42 U.S.C. §1983 in spite of the availability of post-deprivation remedies, contrary to *Parratt*.

There were many post-deprivation remedies available to Plaintiffs. They knew the City Manager had made a mistake, but they deliberately chose not to tell him or the City Council about it in order to obtain a quick retraction and correction of the error (which is called "sandbagging" in these parts). Their First Amended Petition sought damages in the state court and their Second Amended Petition in state court sought declaratory judgment of the proper zoning status, so Plaintiffs cannot claim that they had no state court remedies.

It is true, as the Eighth Circuit opinion points out (794 F.2d 337), that the presence of post-deprivation remedies is important only if pre-deprivation remedies are impractical. But the Eighth Circuit opinion then states that, "There are no reasons offered by the City nor can we perceive of any in this fact situation which would justify a denial of a pre-deprivation hearing." Counsel does not understand what sort of pre-deprivation hearing the Eighth Circuit has in mind. The reverter exemption was permanently cast into Plaintiffs' 1973 zoning ordinance and no hearing or other action by the City Manager or anyone else could take the exemption away or revert the zoning. *If* this case involved a situation where Plaintiffs had *not* been given the exemption in 1973 and the City Manager then determined that

three years had passed and proposed to deny them the right to use the C-4 zoning, perhaps the Eighth Circuit was intending to say that a hearing would be constitutionally required before he could do so, but those were not the facts here.

Available post-deprivation remedies may include informal and formal contacts with governmental agencies, like Plaintiffs could have used here to correct the City Manager's mistake, such as simply telephoning or writing him or contacting the City Council members or officially petitioning the City Council. Several cases have held that the availability of such contacts were sufficient to avoid the §1983 claim of lack of due process: *Toney-El v. Franzen,* 777 F.2d 1224 (CA7 1985); *Signet Construction v. Borg,* 775 F.2d 486 (CA2 1985); *Barbian v. Panagis,* 694 F.2d 476 (CA7 1982).

Plaintiffs' own deliberate silence was the only thing which permitted the City Manager's mistake to affect them, even if they had offered any evidence of damage.

III

The Eighth Circuit opinion permits a property damage claim to be brought under 42 U.S.C. §1983 when there has been no "deprivation" of property as defined by *Parratt, Daniels,* and *Davidson.*

What "deprivation" did Plaintiffs suffer here? They did not lose their C-4 zoning due to the passage of time or change of the zoning map, because the parcel was exempt from the reverter. They did not produce a single witness or other evidence at the trial that they suffered any damage or loss from anyone having read the City Manager's comments to the press or having examined the revised zoning map. At most, Plaintiffs were "deprived" of a freedom from erroneous opinions by the City Manager which were random (it never happened before or since) and unauthorized (the statements were contrary to Plaintiffs' 1973 C-4 zoning ordinance), and state court remedies were available to correct such a loss.

Daniels and *Davidson* made it clear that losses from negligence are not "deprivations" in the §1983 sense (although Justice Blackmun would disagree and arrive at denial of §1983 coverage by a different route).

CONCLUSION

The Eighth Circuit opinion is contrary to *Parratt, Daniels, Davidson,* and a host of other rulings by this Court, and a Writ of Certiorari should issue to review that opinion.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-1356, 84-1304

Westborough Mall, Inc., a corporation, George Staples, Jr., individually, and as sole general partner of Westborough Mall Associates, a Missouri Limited Partnership,
Appellees,

vs.

City of Cape Girardeau, Missouri, a municipal corporation,
Appellant.

Paul W. Stehr, Oliver A. Hope, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, Drury Industries, Inc., a corporation and May Centers of Cape, Inc., a corporation.

Westborough Mall, Inc., a corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its sole general partner,
Appellants,

vs.

City of Cape Girardeau, Missouri, a municipal corporation, Charles L. Drury, Drury Industries, Inc., a corporation. May Department Stores Co., a corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a corporation and May Centers, Inc., a corporation,
Appellees.

Submitted April 11, 1985
Decided June 17, 1986

Before LAY, Chief Judge, McMILLIAN, Circuit Judge, and WOODS,* District Judge.

McMILLIAN, Circuit Judge.

Westborough Mall, Inc., a corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri limited partnership, (appellants) appeal from a final judgment entered in the District Court for the Eastern District of Missouri upon a jury verdict in a 42 U.S.C. § 1983 action in favor of the City of Cape Girardeau, Missouri (the City), members of the city council in their individual capacities, Drury Industries, Inc., May Department Stores Co., West Park Associates, May Centers of Cape, Inc., and May Centers, Inc. (appellees). Appellants alleged a denial of procedural due process, a conspiracy between the City and the private appellees to deprive them of their constitutional rights and antitrust violations. For reversal appellants argue that the district court erred (1) in instructing the jury, (2) in holding that the actions of the city officials did not represent official policy, and (3) in denying appellants' motion for directed verdict and for judgment notwithstanding the verdict on the procedural due process claim against the City. For the reasons discussed below, we reverse and remand for proceedings consistent with this opinion.

This case is before this court on appeal for the second time. In the first appeal a grant of summary judgment in favor of appellees was reversed and the case was remanded for trial. *Westborough Mall, Inc. v. City of Cape Girardeau,* 693 F.2d 733 (8th Cir. 1982) (*Westborough I*), *cert. denied,* 461 U.S. 945, 103 S.Ct. 2122, 77 L.Ed.2d 1303 (1983). The following statement of facts is taken in part from the opinion in *Westborough I.*

---

* The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas, sitting by designation.

In the early 1970's both appellant George Staples, Jr., and appellee Charles Drury, president of Drury Industries, Inc., separately expressed interest in developing a shopping mall in the City of Cape Girardeau, Missouri. In 1973 Staples entered into a long-term lease on approximately 67 acres of land for the purpose of constructing a regional shopping facility referred to as Westborough Mall. On June 5, 1974, the Cape Girardeau City Council enacted Ordinance NO. 904 which rezoned the Westborough Mall property to C-4, a zoning classification specifically designated for regional shopping center development. This ordinance also exempted the property from the provisions of another ordinance (Ch. 30, § 31(e)), which provided that if a shopping center was not constructed on property rezoned C-4 within three years, the zoning would automatically revert to the classification in effect prior to the C-4 zoning. This latter ordinance is referred to as the automatic reverter provision.

Staples unsuccessfully attempted to secure "anchor" tenants for the proposed Westborough Mall shopping center. Regional shopping centers depend on "anchor" tenants which are large department stores; smaller stores generally will only agree to lease space in the shopping center after the "anchor" stores have agreed to lease.

In September 1976 Staples formed Westborough Mall Associates, a limited partnership, to develop the Westborough Mall site. The partnership raised $800,000 and received a building permit from the City in June 1977. Also in June 1977 the city by ordinance corrected certain legal descriptions of the Westborough property and confirmed that the property was zoned C-4. Site work began in 1977: a survey was conducted, water drainage systems were installed, and grading and other surface improvements were made. By December 1978 more than one million dollars had been spent on the Westborough Mall site. At this time Westborough Mall Associates had received letters of interest from many smaller stores although no anchor tenants had made a commitment. Steps were taken to

secure additional financing and Westborough Mall Associates was investigating a new anchor store concept — an "elite" store composed of a number of small tenants.

Appellee Drury's plans for a shopping center in Cape Girardeau were also proceeding during this period. Drury was interested in developing a shopping center called the West Park Mall which was to be located on land owned by Drury that was less than one mile from the Westborough site. Drury Industries, Inc., and May Centers of Cape, Inc., formed a partnership to develop this center. May Centers, Inc., is an experienced shopping mall developer and Famous Barr Co., a large department store chain, is a subsidiary of the May Co.

Drury's contribution to the venture included dealing with city officials. In 1974 Drury received a letter from the city attorney which indicated that Drury had the option of performing initial work with C-2 zoning. In 1977 Drury informed the May officials that he had already talked with W. G. Lawley, the city manager, and planned to talk with the mayor privately about obtaining C-2 zoning on all the West Park Mall property. After a September 1978 meeting with Lawley and the city building commissioner and engineer, Drury told May officials that he had "tacit city approval for C-4 zoning for the shopping center site in exchange for the Silver Spring Road extension right of way that he owned." On April 4, 1979, the city council approved Drury's C-2 zoning application.

On April 5, 1979, Staples filed a lawsuit[1] in state court challenging the rezoning of the West Park Mall site. On the

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[1] Appellants' action in state court against the five members of the city council individually sought a declaratory judgment that the C-2 zoning of the West Park Mall was invalid.

In July 1979, following the zoning of the West Park Mall to C-4, appellants filed their first amended complaint. The City of Cape Girardeau and a recently elected council member were added as defendants. Appellants sought an injunction against the existing West Park

next day, the city manager announced to the media that appellants' C-4 zoning had reverted. The local television news and Cape Girardeau newspapers carried the story. On April 11, 1979, after conferring with the city attorney, the city manager[2] gave written instructions to the city engineer to change the City's master zoning map[3] to show a reversion of the Westborough site from C-4 to the original zoning. The city engineer followed these directions. The engineer was also directed not to issue or renew building permits for mall construction to appellants.

At a meeting of the city council on April 17, 1979, the city manager submitted a study session report to the council which advised the council that appellants' C-4 zoning had reverted by

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Mall rezonings, a permanent injunction against future rezoning, and $2.5 million for damage to their "reputation and credibility" resulting from the city manager's statements about the zoning of the Westborough Mall.

In March 1979 a second amended complaint was filed in state court. George Staples, Jr., and Westborough Mall Associates were added as plaintiffs and Drury Industries, Inc., May Centers, Inc., May Centers of Cape, Inc., W.G. Lawley and Charles L. Drury were added as defendants. The second amended complaint specifically pleaded the automatic reverter exemption and asked for a determination of the Westborough Mall C-4 status, a declaration that the West Park Mall rezonings were invalid, a prohibition against further West Park development, relief under 42 U.S.C. § 1983, $20 million actual damages, and $5 million punitive damages.

[2] W.G. Lawley, city manager of the City of Cape Girardeau, testified he was the chief executive officer for the City and was responsible for the administration of city government and the enforcement of city ordinances. He also testified that he supervised the City Engineering Department, which was responsible for issuing building permits.

[3] The City's master zoning map was a part of the zoning ordinance and is the official record of the zoning districts as established by City ordinance. The map is maintained during the life of the ordinance.

operation of the automatic reverter provision. The report stated in part: "[U]ntil instructed otherwise by the City Council or Court of proper jurisdiction, the City Manager intends to apply provisions of this section [automatic reverter section] to the Westborough Mall property." The city manager further stated that the automatic reverter provision applied because appellants had not constructed a shopping mall on the Westborough Mall site within three years of the granting of C-4 zoning in 1974. Although the city council discussed the issue, no action was taken at this meeting.

On May 23, 1979, appellants' financier wrote to the city manager concerning the status of the Westborough Mall zoning. The city manager replied that in his opinion the C-4 zoning had reverted and he enclosed copies of the ordinance and the official zoning map which reflected the reversion.

On August 1, 1979, the West Park Mall developers obtained a rezoning of their property from C-2 to C-4. Work continued and the West Park Mall opened in 1981.

In September 1980 the city council adopted Ordinance No. 1599, "reaffirming" that the Westborough Mall site was zoned C-4. This ordinance confirmed that the Westborough Mall's C-4 grant had been specifically exempted from application of the automatic reverter provision.

In 1980 appellees removed appellants' pending state action to federal district court. On September 5, 1980, the district court granted appellants' motion to file another amended complaint. The complaint as amended contained seven counts. Count I alleged a 42 U.S.C. § 1983 procedural due process claim against the City and the members of the city council and the city manager individually; Count II alleged a conspiracy to deprive appellants of their constitutional rights; count III alleged a claim for antitrust violations.[4]

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[4] Count IV was an antitrust conspiracy claim against all the defendants. Count V was a conspiracy claim for malicious interference

The district court subsequently entered summary judgment on all counts in favor of all defendants and denied appellants' request for summary judgment. In November of 1982 this court in *Westborough I* reversed the district court and held that appellants had stated sufficient facts to entitle them to a trial on the first six counts. 693 F.2d at 748. However, this court sustained the summary judgment in favor of appellees on Count VII seeking a declaratory judgment that the West Park Mall rezonings were invalid. *Id.* This court also held that appellants had no standing to challenge the West Park Mall rezonings. *Id.* This court further dismissed all counts against the members of the city council and the city manager in their individual capacities. *Id.*

A ten-day trial was held in October 1983 on the six counts. Appellants voluntarily dismissed three counts (Counts IV, V, and VI) and the jury returned a verdict in favor of appellees on the other three counts (Counts I, II, and III). Appellants' motions for a new trial and for judgment notwithstanding the verdict were denied. This appeal followed. Appellees cross appealed from the denial of attorneys' fees. Appellants on appeal have abandoned their antitrust claims and appellees have abandoned their claim for attorneys' fees.

I. ***Jury Instructions***

Appellants initially argue that the district court's instructions to the jury relating to Count I were prejudicially erroneous, confusing and misleading, and failed to properly charge the jury on key elements of the case. Appellants also assert that the district court's instructions disregarded the law of the case.

In reviewing the trial court's instructions to the jury, we must consider the charge as a whole. *E.g., Total Petroleum, Inc. v.*

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with appellants' business. Count VI was a monopoly conspiracy claim. Count VII sought a declaratory judgment that the West Park Mall rezonings were invalid.

Davis, 788 F.2d 476, 484 (8th Cir. 1986). There is no harmful error if the charge in general correctly instructs the jury, even if one portion is technically incorrect. *Houston v. Herring,* 562 F.2d 347, 348 (5th Cir. 1977)(per curiam). However, "erroneous instructions are not cured by correct instructions in other portions of the charge when 'the charge leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberation.' " *Id.* (citations omitted). "The test is not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.' " *Id.* at 359 (citation omitted). With these principles in mind, we consider each of appellants' challenges to the jury instructions.

Instruction No. 13 — Automatic Reverter

Instruction No. 13 on the automatic reverter stated in part: "You are instructed that plaintiffs admit that there has never been any legal reverter of the Westborough Mall tract." This statement was based on appellants' amended complaint, paragraph 14b, which stated: "[T]here, in fact, had been no reverter and...said purported reverter, publicized by defendants, was false and illegal, in that Ordinance 904 specifically excluded plaintiffs' land from the reverter provisions...."

Appellants argue that instruction No. 13 incorporated appellees' basic argument and was tantamount to instructing the jury that the City was not liable. Appellants contend that the district court should have given proposed instruction No. 7,[5]

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[5] Plaintiff's proposed instruction No. 7 read as follows:

> The Defendant, City of Cape Girardeau, should be found liable only if the City itself, by an official policy or custom, caused a violation of the Plaintiffs' constitutional rights. The City is not responsible merely because of an isolated incident where one of its employees acted. However, the City will be

which stated that the City may be liable for the actions of the city manager even though his actions were illegal. Appellees argue that the district court did not err in giving instruction No. 13 because it was extracted from appellants' amended complaint.

We conclude after a careful review of the instructions as a whole that instruction No. 13 is prejudicially erroneous because it is not a complete and accurate statement of appellants' position concerning the automatic reverter. Appellants have consistently asserted that Ordinance No. 904 excluded the Westborough Mall site zoning from the application of the automatic reverter provision and the City later affirmed this.

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liable for the actions of the City Council or of other highranking officials who had final authority to act and whose actions may fairly be said to represent official policy.

It is not required that a policy be officially adopted by the City's lawmakers to create liability, although a resolution or ordinance is clearly the official policy of the City. If the action of a public official has the force of law, the City itself will be liable for acts of individual officers and employees committed pursuant to that action.

It is not required that there be an ongoing pattern of events to establish liability against the City. If a single event takes place pursuant to a general policy, or itself establishes policy, the City may be liable for that action. Moreover, you are instructed that the Defendant City's continuing failure to remedy or undue delay in stopping known unconstitutional conduct of its public officials is a type of informal policy or custom that gives rise to official policy.

You are specifically instructed that a person's action or conduct depriving Plaintiffs of a Constitutional right may fairly be said to represent official policy. In other words, because such action or conduct may be unlawful does not prevent official policy from being represented.

The City Manager is one City official whose actions represent municipal policy, especially if he joined with other high-ranking municipal officers in invoking municipal authority against the Plaintiffs.

What appellants therefore complained about is not a reversion as the result of the automatic reverter provision, but rather the actions of the City which allegedly had the same effect as the automatic reverter provision. Instruction No. 13 is a serious distortion of appellants' theory concerning the actions of the City. The misleading information contained in instruction No. 13 is not corrected or clarified at any other place in the district court's instructions. *See, e.g., Hrzenak v. White-Westinghouse Appliance Co.*, 682 F.2d 714, 719 (8th Cir. 1982) (single erroneous instruction does not require reversal if error was cured by another instruction or by consideration of the entire charge).

In addition, we agree with appellants that this instruction is contrary to the law of the case. In *Westborough I*, this court considered appellees' argument that no reverter had occurred because the Westborough Mall site had been excluded from the operation of the automatic reverter. The court concluded that "from April 1979, to September 1980, [appellants] were effectively deprived of their C-4 classification." 693 F.2d at 741.

The court recognized then, as we do now, that the deprivation of a constitutional right does not depend on form. We must look at the substance of the actions taken relative to a constitutionally protected right. The essence of a right may be destroyed although the plaintiff's right is still recognized in an ordinance or in a legal title. As the Eleventh Circuit observed in *Reed v. Village of Shorewood*, 704 F.2d 943 (11th Cir. 1983), "deprived" in the due process sense cannot just mean destroy. "If the state prevents [one] from entering [his or her] house it deprives [him or her] of a property right even if the fee simple remains securely [his or hers]. A property right is not bare title, but the right to exclusive use and enjoyment." *Id.* at 949. So if it is true, as alleged by appellants, that appellees' actions destroyed the value of appellants' C-4 zoning right and forced appellants ultimately to give up construction of a shopping center, appellants were deprived of their property right in the C-4 zoning, even though the C-4 zoning classification was never actually reverted or revoked.

Instruction No. 21 — Availability of Post-deprivation Remedies

Appellants next argue that instruction No. 21, which addresses post-deprivation remedies, was contrary to the law of the case and the law in this circuit. The district court instructed the jury that the availability of post-deprivation state remedies was a defense to a § 1983 action. The district court further instructed the jury that they must consider whether the various alternatives outlined in the instruction were adequate to correct the reverter.[6]

Appellees argue that the district court correctly instructed the jury that appellants had waived their complaints because they had not pursued available administrative or state judicial remedies to correct the mistake of the city manager. Appellees, relying on *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), argue that no constitutional deprivation occurred because of the availability of these state remedies.

This court in *Westborough I* considered appellees' argument that appellants by their failure to bring the error to the city

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[6] Instruction No. 21 read as follows:

> In considering whether plaintiffs have been deprived of any federally protected constitutional right, you must consider whether they had adequate "post-deprivation" state law remedies. By this I mean, even if you find that the purported "reverter" took place and was the result of an unlawful conspiracy between the City of Cape Girardeau and the West Park defendants you must further consider whether this resulted in a civil rights claim. In this regard, you should consider the fact that plaintiffs could have petitioned a court of the State of Missouri for preliminary injunction requesting that the alleged reverter be corrected. You should further consider the fact that plaintiffs could have sought to have the purported reverter corrected by the City of Cape Girardeau, by talking to the City Manager or the City Council. You must determine whether these various alternatives provided adequate methods of correcting the "reverter" under state law.

manager's attention, waived their right to challenge the actions of the city manager. This court held that the waiver argument was "clearly without merit." 693 F.2d at 740 n. 4. Plaintiffs in § 1983 actions are not required to exhaust other remedies before resorting to suit in federal court. *Patsy v. Board of Regents*, 457 U.S. 496, 516, 102 S.Ct. 2557, 2568, 73 L.Ed.2d 172 (1982).

In addition appellees' and the district court's reliance on *Parratt v. Taylor* to bar appellants' claim is misplaced. The availability of post-deprivation remedies is not a defense to the denial of procedural due process where predeprivation process is practicable. *Parratt v. Taylor*, 451 U.S. at 543, 101 S.Ct. at 1916; *Littlefield v. City of Afton*, 785 F.2d 596, 599 (8th Cir. 1986). There are no reasons offered by the City nor can we perceive of any in this fact situation which would justify a denial of a predeprivation hearing.

We conclude that this erroneous instruction requires reversal because it permitted the jury to improperly find that appellants suffered no constitutional violation because of the availability of state post-deprivation remedies. Indisputably, this instruction was critical to appellants' claim and resulted in prejudice to appellants.

Failure to Define "Official Policy"

Appellants next argue that the district court erred in refusing to define "official policy" and in refusing to give appellants' proposed instructions Nos. 7-10. Appellants argue that "official policy" is a legal term which has a specific meaning within the context of § 1983 litigation and is neither universally understood by lay persons nor appreciated in all its legal ramifications.

Appellees argue that the district court did not err in failing to define "official policy" because the term is readily understood by a jury. Appellees further assert that appellants' proposed jury instructions offered no definition of official policy. Rather

appellants' instructions list the various actions which appellants contended constituted evidence that the city manager's conduct was official policy. Appellees lastly argue that appellants proposed instructions were properly refused because they misstated the law by requiring the jury to find official policy based on certain actions rather than permitting the jury to so find.

The district court, in instruction No. 6, referred to official policy but did not define "official policy." The court in this instruction identified five elements which the jury had to find in order to return a verdict for appellants. Two of these elements are relevant to this discussion. The district court stated that the jury must believe

> that a public official or employee of the Defendant City acted as follows: the City Manager directed that the official zoning map of the City be changed to reflect a reversion or change of [appellants'] zoning from a zoning district which allowed construction of shopping centers (District C-4) and "such action or conduct may fairly be said to represent *official policy*" of the ... City of Cape Girardeau.

(emphasis added).

The parties have not directed us to cases which have considered whether official policy must be defined nor have we found any cases which have discussed this particular issue. However, where terms are not readily understood by the jury or where the possibility of confusion concerning a term exists, the court should define or explain such a term. *See Federal Enterprises, Inc. v. Evans,* 786 F.2d 817, 820 (8th Cir. 1986) (instruction deficient because "key terms, requiring independent factual finding," were not defined); *Board of Water Works Trustees v. Alvord, Burdick & Howson & Dorr-Oliver, Inc.,* 706 F.2d 820, 824 (8th Cir. 1983). We do not agree with appellees that official policy in § 1983 cases is readily understood by a jury without instructions from the court.

"Official policy" had been defined or discussed in many cases prior to the trial of this case. *E.g., Williams v. City of Valdosta,* 689 F.2d 964, 969 (11th Cir. 1982); *Turpin v. Mailet,* 619 F.2d 196, 201-202 (2d Cir. 1980). The court in *Westborough I* also offered guidance to the parties and to the district court on what constituted official policy.[7]

The Supreme Court, in a case decided after our decision in *Westborough I,* has once again defined public policy, which may be the basis of municipal liability. *Pembaur v. City of Cincinnati,* ____ U.S. ____, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (*Pembaur*). The Court in *Pembaur* considered whether a single action by an official can result in county or municipal liability. The Court held that "municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." At ____, 106 S.Ct. at 1300. The Court further stated that municipal liability may be imposed for a single decision by a municipal policy maker if the single act (1) is a decision of the legislative body, or (2) is executed in compliance with formal rules or understandings that are intended to, and do, establish fixed plans of action to be followed under similar circumstances, consistently and over

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[7] We note that the instruction offered by appellants is based substantially on this court's decision in *Westborough I.* This instruction, although not designated as a definition of official policy, is a substantially accurate definition of official policy. The district court, however, could have properly found the last two paragraphs of the instruction to be inaccurate in part. In the present case, where an instruction on official policy is essential to the jury's understanding of the case, the district court may not omit the instruction if the tendered instruction is not entirely correct. The court has the "duty to give the substance of the requested instruction where it appears that the instruction on the issue is [necessary] to enable the jury to determine intelligently the question." *Brandes v. Burbank,* 613 F.2d 658, 668 (7th Cir. 1980).

time, or (3) is directed by those who establish governmental policy. *Id.* at ____ - ____, 106 S.Ct. at 1298. The Cuort recognized that municipalities often spread policy-making authority among various officers and official bodies; and, consequently, different officials may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. *Id.* at ____, 106 S.Ct. at 1300.

On remand, the district court should incorporate a definition of "official policy" in its jury instructions.

Instruction No. 30

Next, appellants argue that instruction No. 30 was erroneous because it required the jury to find that appellants had been injured in their business or property before the jury could return a verdict in favor of appellants on the § 1983 procedural due process claim. Appellants argue that injury to business or property is not a prerequisite to liability under § 1983 and that the instruction misled the jury into believing that the deprivation of constitutional rights is not in itself injury without more.

Appellees argue that this issue was not preserved for review because appellants failed to object to instruction No. 30. Further, appellees argue that appellants waived any error by putting the same requirement of damage in their own verdict instruction.

We find no support in the record for appellees' contentions. Although appellants did not object specifically to instruction No. 30 by number, the first objection made by appellants to the proposed charge was that "the proposed charge. . . will mislead the jury into believing that a deprivation of constitutional rights is not in itself damage, and requires the jury to believe that there needs to be an extra showing of damage over and above that initial deprivation." Moreover, appellants did not, as appellees state, use language in their proposed instructions which cor-

responds at all to the instructions given by the district court. The only similarity is that both instructions require the jury to find that the actions of appellees have caused damage to appellants.

We hold that instruction No. 30 is prejudicially erroneous because it improperly permitted the jury to find against appellants if the jury found that appellants did not sustain damage to businesses or property. A plaintiff whose constitutional rights have been violated is entitled to a finding of liability and nominal damages even if no compensatory damages are shown. *Carey v. Piphus,* 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978).

Instructions as a Whole

Appellants next argue that the instructions taken as a whole were prejudicially erroneous. First, appellants argue that the district court submitted multiple claims to the jury but did not adequately distinguish between the claims and the particular instructions related to each claim. We do not decide this issue because appellants made no objection at trial and cannot now raise this issue on appeal. Fed.R.Civ.P. 51; *Smith v. Honeywell,* 735 F.2d 1067, 1075 (8th Cir. 1984).

Appellants' next complaint is that instruction No. 1 unduly emphasized appellants' burden of proof. Appellants object to the length of the instruction but do not otherwise indicate in what way the instruction was erroneous. This argument is without merit. Instruction No. 1 consists of four short paragraphs and is an accurate statement of appellants' burden of proof.

Appellants also challenge the district court's reference in the instructions to "purported reverter." We find no error in this usage because appellants also used the term "purported reverter" to indicate that the actions taken by the City had the effect of a reverter although the automatic reverter provision did not apply to them.

Appellants next complain that the district court in instruction No. 14 erred in referring to "defendants' zoning rights" when the reference should have been to "plaintiffs' zoning rights." The sentence as it was read to the jury stated: "Was there a conspiracy between the City of Cape Girardeau and the West Park defendants to cause a reverter of *defendants'* C-4 zoning rights?" (emphasis added) Instruction No. 14 as written correctly refers to "plaintiffs' zoning rights," but the district court inadvertently misread the instruction to the jury. Because there was no issue in this case concerning "defendants' zoning rights," we do not believe the jury was misled by the misreading of the instruction.

Appellants next complain that the district court improperly omitted a portion of their proposed instruction No. 6. The proposed instruction would have required the jury to find that the City had engaged in three actions whereas the instruction given by the court required the jury to find only one action by the City in order to return a verdict for appellants. Consequently, the deletion was not prejudicial to appellants because the district court eliminated additional requirements for a verdict in appellants' favor.

II. ***Directed Verdict and JNOV***

Lastly, appellants argue that the district court erred in denying their motion for directed verdict and for judgment notwithstanding the verdict against the City under Count I. Appellants argue that the uncontradicted evidence showed that the City deprived appellants of their C-4 zoning rights without notice or hearing. Appellants urge this court to remand their § 1983 claims against the City for trial on the issue of damages alone.

Appellees argue that one of appellants' points of error on appeal in *Westborough I* was the denial of their motion for partial summary judgment. *Westborough I* did not explicitly consider

this point. We agree with appellees, however, that appellants' motion for partial summary judgment was implicitly denied by the panel in *Westborough I.*

The standard for directed verdict and JNOV is the same. A verdict should be directed only when the evidence is such that "without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict." *Savage v. Christian Hospital Northwest,* 543 F.2d 44, 46 (8th Cir. 1976) (citations omitted). "A directed verdict is in order only where the evidence points all *one way* and is susceptible of *no* reasonable inferences sustaining the position of the non-moving party.' " *Id.* (citations omitted). " 'In making this determination, the evidence together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party.' " *Id.* (citations omitted).

We hold that the district court did not err in denying the motion for directed verdict or JNOV. Reasonable persons could arrive at different conclusions in this case.

Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1304

Westborough Mall, Inc., a corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its sole general partner,
Appellants,

vs.

City of Cape Girardeau, Missouri, a municipal corporation, Charles L. Drury, Drury Industries, Inc., a corporation, May Department Stores Co., a corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a corporation and May Centers, Inc., a corporation,
Appellees.

No. 84-1356

Westborough Mall, Inc., a corporation, George Staples, Jr., individually and as sole general partner of Westborough Mall Associates, a Missouri Limited Partnership,
Appellees,

vs.

City of Cape Girardeau, Missouri, a municipal corporation,
Appellant.

Paul W. Stehr, Oliver A. Hope, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W.G. Lawley, Drury Industries, Inc., a corporation and May Centers of Cape, Inc., a corporation.

Appeals from the United States District Court
for the Eastern District of Missouri

Filed: October 23, 1986

ORDER

Defendants-appellees' petition for a rehearing en banc is denied. Judges Ross, Gibson, Fagg, and Bowman would grant the rehearing.

Defendants-appellees' petition for rehearing is also denied. In support of their petition for rehearing, the private defendants-appellees contend that the jury verdict in their favor on the Count II conspiracy claim should not be disturbed because the panel found error only in the jury instructions pertaining to the Count I due process claim brought against the City of Cape Girardeau (City). Appellants, on the other hand, contend that the remand is appropriate because a misdirection by the district court on the due process claim prevented the jury from properly considering the conspiracy claim. We agree.

Appellants alleged in Count I of their complaint that the City violated their procedural due process rights and alleged in Count II that the City and the private defendants-appellees conspired to deprive them of these rights. Critical to both claims was the reversion of appellants' C-4 zoning. The district court's automatic reverter instruction in effect told the jury that there was no reverter of the zoning and, therefore, no deprivation of appellants' consitutional rights. It, therefore, follows that the jury could reason that there was no conspiracy because there was no reverter. Thus, the automatic reverter instruction also effectively took the conspiracy claim away from the jury. For this reason, a remand of the conspiracy claim against the private defendants is required.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals for the Eighth Circuit

Supreme Court, U.S.
FILED
JAN 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 86-1092

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF CAPE GIRARDEAU, MISSOURI,
Petitioner,

v.

WESTBOROUGH MALL, INC.,
GEORGE STAPLES, JR.,
and WESTBOROUGH MALL ASSOCIATES,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Case No. 86-1092

IN THE

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CITY OF CAPE GIRARDEAU, MISSOURI,
Petitioner,

v.

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GEORGE STAPLES, JR.,
and WESTBOROUGH MALL ASSOCIATES,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner seeks review of the decision of the Eighth Circuit which remanded this case for a new trial because of prejudicially erroneous and misleading jury instructions. The petition curiously ignores that opinion and the present posture of this case. The Eighth Circuit's decision announced no new legal principles nor did it depart from well-settled standards in reviewing and reversing the verdict below. Rather, the Appellate Court determined that a number of the jury instructions given were prejudicially erroneous and misleading, requiring a new trial.

Conspicuously absent from the City's petition is any discussion of error on the part of the Appellate Court. Instead, the City is asking this Court to consider what

might happen if evidence at the new trial is solely as the City wishes it to be and if jury instructions that petitioner might offer are rejected. When the City's failure to find fault with the Eighth Circuit decision is coupled with the factual distortions in the City's statement of the case, it becomes apparent that a writ of certiorari is not warranted.

The foundation for the City's entire petition, and the basis for its criticism of what the Eighth Circuit decision might permit, is its argument that the City Manager merely voiced a mistaken opinion as to respondents' shopping center zoning. This factual issue should be submitted to a jury, not to the Supreme Court. Furthermore, the City's portrayal of the facts grossly distorts undisputed evidence of its official actions based upon City documents and the testimony of City officials.

The City's argument also ignores the presence of a jury question as to whether there was a conspiracy between City officials and the developers of a competing shopping center. Obviously, the City's characterization of the official actions as a single, random, unauthorized mistake cannot be accepted where there is evidence that the City acted in furtherance of a conspiracy with competing developers.

STATEMENT OF THE CASE

The City's statement of the case presents a glaringly one-sided and misleading portrayal of the evidence. The Eighth Circuit's discussion of the facts is more accurate and reliable. (See Appendix A at A-3 to A-6.) However, because of petitioner's oft-repeated clamor that all that happened was an unauthorized mistaken opinion offered to the media by the city manager, respondents believe that a discussion of the evidence of the City's official actions would be helpful.

This case is about petitioner's actions which deprived respondents of their constitutionally protected property interests. After respondents obtained zoning approval to build a shopping center and spent more than one million ($1,000,000.00) dollars on site preparation and pre-leasing activities in reliance on their shopping center zoning, the City, without notice, reverted respondents' zoning to prior classifications. This resulted in a three million ($3,000,000.00) dollar depreciation in the value of the property and prevented respondents from being able to either develop or sell the property.

On April 6, 1979, after a special meeting of the city council attended by the city manager and the city attorney to discuss the issue (Tr. 3:42-43), the city manager and other City officials told a local television station that respondents' Westborough Mall site was no longer zoned for a shopping center development. (Tr. 3:40-41, Ex. 1136) Following this announcement, the city manager, who is the chief executive officer of the City of Cape Girardeau responsible for the administration of city government, enforcement of city ordinances, and supervision and control of city employees (Tr. 3:13, 8:91), prepared a memorandum to the city engineer directing him to carry out the reversion of respondents' zoning (Tr. 3:44, Ex. 1141).

The city manager discussed this memorandum with the city attorney, with special counsel, and with members of city council. (Tr. 3:47, 3:52) The city manager testified that his authority to issue instructions to the city engineer to change the master zoning map, which is an integral part of the zoning ordinance and the official record of the City's zoning district (Tr. 3:15), was based on the City's zoning code, specifically the reverter clause in Section 30-31(e), as well as his duty to supervise the engineering department and the city manager's statutory obligation to enforce all ordinances. (Tr. 3:50-51)

The memorandum directed the city engineer to mark the City's master zoning map to reflect the zoning that existed prior to when the C-4 zone was established and ordered that no building permits be issued or renewed for mall construction on this site. (Ex. 1141) Pursuant to this memorandum, the City's master zoning map was changed to reflect the reversion of respondents' zoning. (Tr. 3:53, 7:138, Ex. 2459)

On April 13, 1979, the city manager prepared a study session report, a formal device used to communicate with the city council (Tr. 3:14), indicating that he had instructed the City Engineering Department not to issue building permits for Westborough Mall construction and that:

> "Until instructed otherwise by the City Council or a Court of proper jurisdiction, the City Manager intends to apply provisions of this section [30-31 of the City Zoning Code] to the Westborough Mall property." (Tr. 3:53, Ex. 1146)

The study session report was given to each of the council members (Tr. 3:56) and was discussed at the city

council's April 17, 1979 study session. (Tr. 3:54-56) With full knowledge, Council allowed the zoning reverter to stand for more than a year and a half during which time a competing shopping center was built and the window of opportunity for Westborough Mall closed. Only then did Council adopt an ordinance correcting the reverter and reaffirming respondents' shopping center zoning because all along it had been exempt from the reverter provision, Section 30-31(e) of the City zoning code. (Tr. 3:61-63, 6:49-50, 8:59, 8:79) This was too little, too late.

REASONS FOR DENIAL OF WRIT

It is evident from the very opening of petitioner's argument that the City is concerned with how the facts in this case should be viewed. A writ of certiorari should not be granted "merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924).

More significantly, given the present posture of this case, a review of what the evidence may or may not show is certainly premature. The Eighth Circuit has now twice concluded that respondents' evidence could support a claim for damages under 42 U.S.C. § 1983. It is appropriate for a jury, after proper instructions, to weigh the evidence and reach a verdict. Given the Eighth Circuit's conclusion that "[r]easonable persons could arrive at different conclusions in this case" (A-18), there is no reason to grant a writ of certiorari.

In addition, petitioner's failure or inability to even suggest how the appellate court's opinion is erroneous or reversible indicates that a writ of certiorari is not in order. Petitioner merely claims that the Court of Appeals decision "permits" three possible outcomes. (See Petition at 6, 10 and 11) Clearly, the petitioner's concerns can be allayed if the City offers appropriate jury instructions on remand. Thus, there is simply no benefit from a review by the Supreme Court here.

I. RESPONDENTS DO NOT CLAIM A RIGHT TO DAMAGES BASED UPON SOME RANDOM, UNAUTHORIZED NEGLIGENT MISTAKE.

Petitioner argues that *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and its progeny bar any claim for relief by respondents. That argument, however, fails to confront respondents' actual claim of abuse of power and of deliberate and intentional conduct. The evidence adduced at trial indicates that virtually every high-ranking city employee was involved in the decision to revert respondents' zoning. The city attorney, as well as its special counsel (who continues to represent petitioner here), along with the city manager and city council, were involved throughout this decision-making process. (Tr. 3:43, 3:47) There were several council meetings (Tr. 3:42-43, 3:54-56), official reports and memoranda by the city manager to council and the city engineer (Tr. 3:14, 3:44, 3:53, Ex. 1141, Ex 1263), and, of course, numerous discussions. (Tr. 3:42, 5:52, 3:58-60) On each occasion the decision was made to apply the City's automatic reverter clause, Section 30-31(e) of the zoning code, to respondents' property without notice or hearing.

This court has held in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), that inadvertent as well as intentional but random unauthorized acts cannot form the basis for a due process claim (where a post-deprivation remedy is available) because it is impractical to provide a pre-deprivation hearing. This is because it is impossible to predict, in such a situation, when the loss will occur and thus post-deprivation remedies are constitutionally sufficient. On the other hand, in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), this court held that post-deprivation remedies do not sat-

isfy due process where the deprivation is caused by established state procedure, rendering the loss predictable.

Daniels v. *Williams*, 474 U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and *Davidson* v. *Cannon*, 474 U.S. ____, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), do not alter these principles. Due process applies to "*deliberate* decisions of government officials to deprive a person of life, liberty or property." *Daniels*, *supra*, 106 S.Ct. at 665 (emphasis in original). However erroneous the City's actions may have been here, the officials clearly acted deliberately and intentionally to take away the zoning which permitted construction of respondents' shopping mall. This was not some random, unauthorized event, but rather an official course of action knowingly adopted pursuant to an established procedure, Section 30-31(e) of the zoning code, with the blessings of the City's chief executive officer, its legislative body, and the City's legal advisors.

After having accomplished exactly what they sought in exercising the reverter of the zoning, without notice and hearing, the City should not be permitted to escape responsibility for a harm deliberately done simply by now saying, "Oops, we made a mistake."

II. A POST-DEPRIVATION REMEDY IS NOT SUFFICIENT WHERE A PREDEPRIVATION HEARING WOULD BE PRACTICAL AND MEANINGFUL.

Petitioner claims it cannot understand how it could have possibly given respondents a hearing before reverting the zoning. The City's zoning code, Section 30-31(e), itself permitted and authorized an automatic reverter without notice and a hearing. This provision was the stated basis for the City's action. (Tr. 3:50-51) Clearly, notice and a hearing prior to the reversion should have been required by the City.

The evidence here indicates the City had ample opportunity to give respondents notice and a hearing prior to the deprivation of their zoning rights. The City held numerous informal discussions as well as several formal meetings of council, i.e. hearings, in which respondents' rights were decided, without respondents being given notice or an opportunity to be heard.

Nor can it be said that respondents "sandbagged" the City, somehow surprising the City with what had been done wrong. As it was, respondents did not discover the official actions taken by the City until respondents' financier received from the city manager a copy of the zoning code and altered zoning map indicating the reverted zoning status of the propery. (Ex. 1263) The City *never* gave respondents notice or afforded them an opportunity to be heard. (Tr. 4:46, 6:72-73)

III. RESPONDENTS SUFFERED A CONSTITUTIONAL DEPRIVATION AND SUBSTANTIAL DAMAGES DUE TO THE CITY'S DUE PROCESS VIOLATION.

Petitioner argues that respondents suffered no constitutional deprivation because the city manager merely voiced an erroneous opinion. More than that occurred; the City's master zoning map, its official record of zoning districts (Tr. 3:15), was changed and sent to respondents' financier. In addition, City officials, both publicly and privately, stated that respondents' zoning had reverted. These actions prevented respondents from being able to either develop or sell their property (Tr. 5:120, 6:75) and caused a three million ($3,000,000.00) dollar depreciation in the value of the property. (Tr. 7:45) The Eighth Circuit recognized that such facts support a finding of a constitutional deprivation. As that court noted, "the deprivation of a constitutional right does not depend on form." (A-10)

Respondents are entitled to the protections of due process upon a showing of a legitimate claim of entitlement created under state law. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Due process thus attaches where "a significant property interest is at stake." *Fuentes* v. *Shevin*, 407 U.S. 67, 87 (1972). Respondents' shopping center zoning and their exemption from the automatic reverter provision certainly created just such a constitutionally protected property interest. More generally, Missouri has recognized the right of a property owner to rely on existing zoning. *Allen* v. *Coffel*, 488 S.W.2d 671, 678-79 (m.o. 1972); *Murrell* v. *Wolff*, 408 S.W.2d 842, 852 (1966); *Burns* v. *City of Des Peres*, 534 F.2d 103 (8th Cir. 1976).

This court stated in *Fuentes* v. *Shevin*, *supra*, 407 U.S. at 87:

> "[t]he right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." See also *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978).

Petitioner argues that respondents suffered no deprivation because the city manager was wrong in declaring the property reverted and changing the master zoning map. However, the magnitude of the City's wrongful conduct cannot defeat respondents' constitutional claim. That respondents would have prevailed at a hearing, if that in fact is what petitioner intends to imply in its argument, is no reason to deny their right to that hearing. The City's ordinance, adopted a year and a half after the reverter, "reaffirming" respondents' shopping center zoning, is sufficient evidence that respondents have been deprived of a constitutionally protected property interest. As the Eighth Circuit noted:

> From April 1979, to September 1980, [respondents] were effectively deprived of their C-4 classification." A-10, quoting *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 693 F.2d 733, 741 (8th Cir. 1982), cert. denied 461 U.S. 945 (1983).

CONCLUSION

The City has pointed out no error by the Court of Appeals and has raised no issue warranting review. If, on remand, there is evidence supporting the City's concerns, proper jury instructions would protect petitioner's interests. Therefore, the writ of certiorari should be denied.

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